Supreme Court, U.S.
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Docket No. _____

GARY N. FRANKEL,

Petitioner,

versus

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR CERTIORARI AND APPENDIX

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QUESTION PRESENTED FOR REVIEW

Do police having no warrant violate the Fourth Amendment by entering a residence in disregard of the owner's explicit objection and then conducting a search, where the supposed "emergency" justifying the police entry was the township police dispatcher's fourth spurious "open line" 9-1-1 call received during a single shift?

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REPORTS OF OPINIONS

The decision of the Supreme Court of New Jersey at Docket No. A-90 (Sept. Term, 2002) (1a) was announced on May 12, 2004 and is published at 179 N.J. 586, 847 A.2d 561.

The July 2, 2001 decision of the Superior Court of New Jersey, Appellate Division, reversing the trial court's suppression of evidence (40a), is reported at 341 N.J. Super. 594, 775 A.2d 665.

The decision suppressing evidence of the Superior Court of New Jersey, Law Division, has not been reported and is reproduced at 52a.

JURISDICTIONAL STATEMENT

The Supreme Court of New Jersey's decision was announced on May 12, 2004. *See* 1a. No rehearing was sought. This Petition therefore will be timely if it is filed no later August 10, 2004.

Certiorari jurisdiction is established by 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Gary N. Frankel, your Petitioner, entered a conditional guilty plea to a marijuana offense, while preserving his right to appeal further the reversal of an order suppressing the evidence of marijuana. The essence of the issue presented is set out in the first paragraph of the decision below (1a):

> [T]he Freehold Township Police Department received an open line 9-1-1 call from defendant's residence and dispatched a police officer to that address. Defendant advised the officer that he lived alone, did not make and could not account for the call, and would not consent to a search of his home . . ..

From a dispatcher's perspective, an "open line" 9-1-1 call "includes when there is no one on the other end of the line and (1) there is no sound on the line; (2) there is static on the line; or (3) there is background noise because the caller put down the phone but did not hang it up." 2a n.2. Open line calls are often initiated without any human involvement. As the New Jersey Supreme Court stated (7a):

> Robert Bulthaupt, Bell Atlantic's team leader for the 9-1-1 control center, testified that between two and five percent of all 9-1-1 calls are

> generated accidentally by non-human means such as by cordless phones with low batteries, answering machines, computer modems, and repair work on telephone lines. Defendant testified that he did not call 9-1-1 on the morning of June 21. His telephone bill indicated that he was using his computer modem to dial into work at 7:26 a.m., the exact time the dispatcher received the 9-1-1 call from defendant's primary telephone line.

Additionally, "defendant's expert reported that the computer might have contributed to an electronic malfunction that created the 9-1-1 signal." 5a n.5.

Whatever caused the spurious 9-1-1 signal, "The State did not dispute that the 9-1-1 call was triggered by some accidental, non-human means, probably related to the operation of defendant's computer." 7a.

On this particular morning spurious 9-1-1 signals occurred with extraordinary frequency [2a n.3]:

> Before receiving the call from defendant's home, [Freehold Township Police Dispatcher] Eck[o] had already received three open line 9-1-1 calls from two different residences during her shift, one at 12:20 a.m.,

> one at 3:05 a.m., and one at 7:06 a.m. The 9-1-1 call from defendant was the fourth open line call of Eck[o]'s shift. She testified that she did not "believe there was anybody on the line on any of those calls."

Dispatcher Ecko sent Officer Gelber to Petitioner's house. Arriving twenty minutes after the open line call registered, Gelber found a white sheet behind the screen door blocking any view into the house.

> Defendant answered the knock at the door by poking his head out from behind the sheet, which he held back with one hand. He appeared both surprised and nervous by the officer's presence. The officer informed defendant that he was responding to a 9-1-1 call and that the dispatcher was unable to make contact with anyone inside the house. With only his head visible, defendant told the officer that he did not dial 9-1-1. When Officer Gelber suggested that perhaps someone inside the house dialed the number, defendant became nervous, tripped over his words, and explained that he lived alone. In turn, defendant's "nervousness was making [Officer Gelber] nervous." Without a

> full view of defendant, and out of concern for his own safety, Officer Gelber asked defendant to step out from behind the sheet. He patted down defendant to ensure that he had no weapons. Officer Gelber then asked defendant if he could check inside the house "to make sure everything was okay." [3a, footnote omitted].

"[Petitioner] displayed a look of shock and panic at the request, asked the officer whether he had a search warrant, and, learning that he did not, denied him consent to enter his home." 4a.

> Officer Gelber, who had never encountered anyone refusing such a "simple request" in his many responses to 9-1-1 calls and in view of defendant's agitated state, then radioed for backup out of concern for his own safety and fearing that someone inside the house was in danger. [4a]

Notwithstanding his purported sense of an emergency, Officer Gelber chose not to search Petitioner's house until a backup officer arrived. Around 8:00 a.m., some 14 minutes after Gelber first came on the scene, a backup officer arrived. Gelber then entered the house, purportedly "to make sure that [Petitioner] was alone and that there was nobody else that really needed help in there." 6a.

> During the search, Officer Gelber discovered in plain view marijuana on a tray inside a closet in one room; marijuana plants and an ultraviolet grow light in a bathroom; and marijuana plants, grow lights, and an elaborate watering system in a room in the basement. Officer Gelber did not find anyone in the house. The officers then placed defendant under arrest and secured a warrant to search the [already-searched] house. [6a-7a]

There followed a three-count indictment for marijuana offenses. Petitioner moved to suppress all evidence derived from the warrantless search. The trial judge, after taking testimony, granted the motion to suppress.

The State appealed. The Appellate Division of Superior Court reversed the trial court and upheld the search. 40a-51a. Following Petitioner's conditional guilty plea to a single charge, the New Jersey Supreme Court granted review. The latter court then invoked the "emergency" exception (1a, 10a-28a), placed this "close case" (32a) within the "limited exceptions to the warrant requirement when the duty to preserve and protect life and the need to act decisively and promptly must outweigh the privacy interests of an individual" (32a-33a) and thereupon affirmed the conviction. 33a.

REASONS FOR GRANTING THE WRIT

At least since *Steagold v. United States*, 451 U.S. 204 (1981), the ancient adage that a man's home is his castle has been assimilated into our law of the Fourth Amendment. "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United States*, 533 U.S. 27, 31 (2001).

The supposedly exigent circumstance constituting one of the "few exceptions" of which *Kyllo* spoke -- a purported emergency -- must rise or fall on the legal and factual significance of a spurious "open line" 9-1-1 signal. Thus, ultimately this Petition asks whether a spurious 9-1-1 signal is strong enough to breach the walls of a man's castle without a warrant.

The surrounding material circumstances in the present record include (1) the inherent glitches in the 9-1-1 technology, as acknowledged by the telephone company's 9-1-1 supervisor, who additionally testified that when glitches arise, they tend to come in clusters; (2) the known unreliability of the 9-1-1 system on the occasion here at issue, the call erroneously attributed to Petitioner's telephone having been a fourth open line signal from three separate locations on a single dispatcher's shift (*see* 54a); (3) the dispatcher's contemporaneously-expressed

belief that it was "ridiculous" to have four open line signals on a single shift (54a); (4) the citizenry uses 9-1-1 in a wide range of perceived emergencies from within and beyond the home, such as spousal abuse, screams in the neighborhood, reports of an auto accident, and seeking an animal warden to pick up a possibly-rabid raccoon; (5) Petitioner's submission without protest to a pat-down, thereby making the danger to the officer insubstantial; and (6) the 20 minute lapse between the 9-1-1 report and Officer Gelber's arrival on the scene followed by a further quarter-hour which elapsed while Officer Gelber, disregarding any possible emergency, awaited a backup before commencing his warrantless search.

The court below concluded from the totality of the circumstances that Officer Gelber had a reasonable belief that a genuine emergency justified his warrantless intrusion. "We find that Officer Gelber had an objectively reasonable and good-faith basis to believe that an emergency was at hand that could not brook delay." 30a. In reaching that conclusion, the court below correctly "g[a]ve no weight to Officer Gelber's testimony that a resident had never before declined to grant him entry to a home when he was responding to a 9-1-1 call, or that defendant told the officer that he could not enter without a search warrant, or that defendant asked if he needed a lawyer." 31a. Neither

did the lower court dwell on nervousness, which appears to be supportive of reasonable suspicion but not reasonable belief. *See United States v. Sokolow*, 490 U.S. 1 (1989). Thus, the lower court's Fourth Amendment analysis ultimately rested on a chimera, namely, a spurious open line 9-1-1 signal.

A. This Court should determine whether a not-uncommon electronic glitch, without more, can support a reasonable belief in an emergency sufficient to exempt police from the Fourth Amendment's warrant requirement. In *Mincey v. Arizona*, 437 U.S. 385 (1978), this Court approved in principle the concept of an "emergency" exception to the Fourth Amendment's warrant requirement. 437 U.S. 392. Since then, as authorities cited in the decision below demonstrate, the emergency exception has been invoked in a multitude of cases in the lower courts wherein, often with success. *See* 23a-28a.

Mincey recognized a very narrow emergency exception. The *Mincey* Court refused to allow a suspicion of an emergency -- the mere possibility that another murder victim might be found on the premises -- to swallow the warrant requirement. Instead, *Mincey* held that warrantless entries and searches under the emergency exception are to be permitted only when police "reasonably believe that a person within is in need of immediate aid." 437 U.S. at 392.

Nothing close to all 9-1-1 calls entails a person "in immediate need of aid." Moreover, open line 9-1-1 calls are inherently less indicative of an immediate need of aid than 9-1-1 calls in which the caller provides factual information indicating an emergency. The mere *a priori* possibility that a person might be in immediate need of aid, which inheres in all 9-1-1 calls, does not translate into the *Mincey*-required reasonable belief that a person in immediate need of aid would be found within the home.

Certiorari should therefore be granted because the scope of the emergency exception is a recurring and constitutionally-significant issue; 9-1-1 systems are now "universal" by operation of 47 U.S.C. § 251(e)(3); and the holding below demonstrates a need to provide guidance for lower tribunals by clarifying generally what constitutes an emergency for purposes of applying the emergency exception to the warrant requirement, and to determine specifically whether an open line 9-1-1 signal without additional clarifying information permits police to conduct a warrantless search of an occupied home over the homeowner's objection.

B. This Court should determine whether an emergency exception to the warrant requirement can be found when the totality of the information known to the police, if presented to a neutral

magistrate, could never have garnered a valid search warrant. New Jersey Court Rule 3:5-3(b) authorizes Superior Court judges to "issue a search warrant upon sworn oral testimony of any applicant who is not physically present." Such sworn oral testimony may be communicated to the judge by telephone, radio or other means of electronic communication." *Ibid.*

During the quarter hour between Officer Gelber's decision to seek a backup before searching the home, and the arrival of the backup, Gelber could have made an oral search warrant application. Such an application, however, would have been an exercise in futility.

Prior to the warrantless search, Officer Gelber could not provide any supporting facts establishing probable cause to believe that any identifiable crime had been committed. Gelber could not provide to a judge any supporting facts establishing probable cause to believe that some person was in harm's way within Petitioner's home. Gelber certainly could not have provided a sworn basis for believing that the suspected person who might be within Petitioner's home probably needed immediate aid.

When a search warrant application can identify no crime and can identify no evidence of crime which the applicant reasonably expects to find, no rational magistrate could possibly find probable cause to issue a search warrant. How, then, can Officer Gelber's subjective

suspicions possibly rise to probable cause to conduct a warrantless search?

In essence, the 9-1-1 open line signal, which the State does not dispute was spurious, is constitutionally no better than a vague, anonymous, tip. The mere fact of an open line 9-1-1 signal, especially in a 9-1-1 system known to generate spurious signals in clusters, provides no more justification for a warrantless search than a vague or conclusory, uncorroborated tip from an anonymous informant that an unidentified crime is in progress at a given location. *See Florida v. J.L.*, 529 U.S. 266 (2000) (an anonymous tip with some specificity does not, without more, justify a stop and frisk); *Illinois v. Gates*, 462 U.S. 231, 238 (1983) ("affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause"); *Aguilar v. Texas*, 378 U.S. 108 (1964) (a purely conclusory affidavit is inadequate). An anonymous tip is grounds for surveillance and inquiry of persons present near the specified location, but if nothing more specific is developed the police have no license to search.

The decision below therefore conflicts in principle with the cited cases, by holding, in essence, that a wholly conclusory anonymous tip that something uncertain but awful might be happening in somebody's home will not, without more, sustain a warrantless search.

Certiorari should be granted to

resolve the manifest conflicts between the decision below and this Court's Fourth Amendment jurisprudence, and to clarify the interplay between the anonymous tip jurisprudence of *J.L.* and *Mincey*'s emergency exception as applied to open line 9-1-1 reports.

C. This Court should determine whether the emergency exception to the warrant requirement extends to circumstances in which the officer at most suspects that there might be an emergency. Officer Gelber at most suspected that there was some unknown person in Petitioner's home, and supposed that the unknown person might need immediate assistance. That Gelber waited almost a quarter hour for a backup officer to arrive is wholly inconsistent with the New Jersey Supreme Court's conclusion that Gelber reasonably believed there was a person in the house "in need of immediate aid." *Mincey*, 437 U.S. at 392. In a true emergency any would-be rescuer would have rushed into the house without awaiting a backup.

Thus, the court below effectively substituted for *Mincey*'s required "reasonable belie[f] that a person within ***is*** in need of immediate aid" (emphasis added), an officer's belief that a person ***might be*** within and ***might be*** in need of immediate aid. 437 U.S. at 392. Thus, while paying lip service to *Mincey*, *see* 11a, 13a, 30a, the court below actually stood *Mincey*'s analysis on its head.

Mincey had rejected out of hand Arizona's contention that "a ***possible*** homicide presents an emergency situation demanding immediate action." 437 U.S. at 392 (emphasis added). Yet in the present case, the searching officer merely suspected a possible homicide or a possible heart attack victim or a possible damsel in distress.

By not rushing to the rescue, Officer Gelber made clear that he entered and searched in order to assuage his curiosity: "The officer wanted to satisfy himself that a domestic violence victim or an injured person in need of assistance was not inside." 3a-4a. This illegitimate purpose explains Gelber's quarter hour delay. That delay is wholly inconsistent with the endangered-life emergency which the majority below found in upholding Gelber's warrantless search of Petitioner's home.

Mincey posited a bright line test for finding an emergency exemption: The presence of a "reasonabl[e] belie[f] that a person within is in need of immediate aid." 437 U.S. at 392. The decision below directly conflicts with *Mincey* by substituting a suspicion for a reasonable belief, and by watering down the immediacy requirement to allow a quarter hour wait for a backup officer, even after Officer Gelber had patted down Petitioner without finding any weapon. At that point, letting the supposedly urgent situation wait until a backup

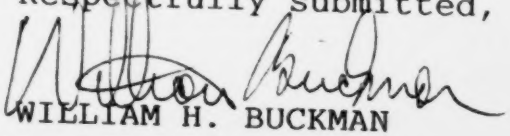
arrived makes no sense whatsoever.

Certiorari therefore should be granted to determine whether *Mincey*'s limitation of an "emergency" warrantless search of a home extends beyond situations where an officer "reasonably believes that a person within is in need of immediate aid," and also encompasses situations such as the present one, in which an officer at most suspects that there might be a person within who might be in need of aid.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the Supreme Court of New Jersey at Docket No. A-90 (Sept. Term 2002).

Respectfully submitted,



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STATE OF NEW JERSEY,
Plaintiff-Respondent,
v.
GARY N. FRANKEL,
Defendant-Appellant.

A-90 September Term 2002

SUPREME COURT OF NEW JERSEY

December 2, 2003, Argued
May 12, 2004, Decided

JUSTICE ALBIN delivered the opinion of the Court.

In this case, the Freehold Township Police Department received an open line 9-1-1 call from defendant's residence and dispatched a police officer to that address. Defendant advised the officer that he lived alone, did not make and could not account for the call, and would not consent to a search of his home so that the officer could satisfy himself that no one was in need of assistance. We must decide whether, under the totality of the circumstances, the officer's limited search of the home for a possible victim was justified under the emergency aid exception to the warrant requirement.

I.

At approximately 7:27 a.m. on June 21, 1999, Freehold Township Police Dispatcher Darlene Ecks received a 9-1-1 call from the home of defendant Gary Frankel, but no one was on the other end of the line.[1] In response, Ecks dialed back the number from which the open line call[2] had originated and received a busy signal.[3]

1 The facts are derived from the motion to suppress hearing and are basically not in dispute.

2 At the hearing, Ecks explained that an "open line" call includes when there is no one on the other end of the line and (1) there is no sound on the line; (2) there is static on the line; or (3) there is background noise because the caller put down the phone but did not hang it up.

3 Before receiving the call from defendant's home, Ecks had already received three open line 9-1-1 calls from two different residences during her shift, one at 12:20 a.m., one at 3:05 a.m., and one at 7:06 a.m. The 9-1-1 call from defendant was the fourth open line call of Ecks's shift. She testified that she did not "believe there was anybody on the line on any of those calls." She did not tell Officer Gelber about the open line calls. Moreover, the record does not reveal whether those other open line 9-1-1 calls were generated by accidental, non-human means or by a person who dialed 9-1-1 either intentionally or inadvertently.

Ecks then dispatched Officer Russell Gelber to defendant's house with the information that she had received a 9-1-1 call from that address and was unable to make contact with a resident. Officer Gelber arrived at defendant's house at approximately 7:46 a.m., and found a white sheet hanging behind the screen door blocking any view through the door or side windows. Defendant answered the knock at the door by poking his head out from behind the sheet, which he held back with one hand.[4] He appeared both surprised and nervous by the officer's presence. The officer informed defendant that he was responding to a 9-1-1 call and that the dispatcher was unable to make contact with anyone inside the house. With only his head visible, defendant told the officer that he did not dial 9-1-1. When Officer Gelber suggested that perhaps someone inside the house dialed the number, defendant became nervous, tripped over his words, and explained that he lived alone. In turn, defendant's "nervousness was making [Officer Gelber] nervous." Without a full view of defendant, and out of concern for his own safety, Officer Gelber asked defendant to step out from behind the sheet.

4 Defendant, however, disputes that the sheet was between himself and Officer Gelber when he answered the door.

He patted down defendant to ensure that he had no weapons. Officer Gelber then asked defendant if he could check inside the house "to make sure everything was okay." The officer wanted to satisfy himself that a domestic violence victim or an injured person in need of assistance was not inside. Defendant displayed a look of shock and panic at the request, asked the officer whether he had a search warrant, and, learning that he did not, denied him consent to enter his home. Defendant also inquired whether he needed an attorney. Officer Gelber, who had never encountered anyone refusing such a "simple request" in his many responses to 9-1-1 calls and in view of defendant's agitated state, then radioed for backup out of concern for his own safety and fearing that someone inside the house was in danger.

While waiting for backup, the officer and defendant conversed on the porch. Defendant explained that he had been using his computer that morning and that the computer might have "inadvertently dialed 911."[5]

5 Defendant maintained two telephone lines in his home, one of which was dedicated to his computer. Although the 9-1-1 call center's records show the 9-1-1 call did not originate from the computer line, defendant's expert reported that the computer might have contributed to an electronic malfunction that created the 9-1-1 signal.

In response to the officer's question whether he had anything inside that he did not want seen, defendant "indicated that there was some sexual stuff inside the residence and he was embarrassed." Officer Gelber confirmed the telephone number that generated the 9-1-1 call and then radioed the dispatcher to dial back that number. The dispatcher did so and informed Officer Gelber that all she received was a busy signal. This information confirmed in Officer Gelber's mind that there might be "somebody inside the house." Defendant, who had overheard the dispatcher's radio transmission, asked the officer if he could retrieve his cordless telephones from his home. Officer Gelber permitted defendant to enter for that purpose and defendant gave the officer consent to post himself in the foyer while he did so. While in the foyer, Officer Gelber observed two rooms, one unfurnished and the other partially furnished with a couch and television. The officer noted that in the partially furnished room a lawn chair was propped up against a sliding glass door from the outside, creating a possible obstacle to anyone trying to enter or exit the house. Although defendant walked down the hallway out of Officer Gelber's sight, he reappeared within seconds with two cordless telephones and stated that one was for each line in his house.

Defendant then led the officer back outside the house where he used the telephone purportedly from his computer line to dial the telephone from which the 9-1-1 call originated. The telephone rang, indicating that the line was no longer busy. The demonstration, however, did not lessen Officer Gelber's suspicions because defendant could have taken the telephone from a person incapacitated in the house.

At approximately 8:00 a.m., after Freehold Township Police Officer Dean Smith arrived at defendant's house, Officer Gelber decided to enter the house "to make sure that [defendant] was alone and that there was nobody else that really needed help in there." He based his decision on the totality of the circumstances known to him: the original open line 9-1-1 call, the two callbacks by the dispatcher that elicited busy signals, defendant's nervous and agitated state, and his general observations of the house. Officer Smith stayed with defendant while Officer Gelber conducted a search limited to those areas where a person or body could be concealed. Officer Gelber did not search through drawers or containers for personal effects.

During the search, Officer Gelber discovered in plain view marijuana on a tray inside a closet in one room; marijuana plants and an ultraviolet grow light in a bathroom; and marijuana plants, grow lights, and an

elaborate watering system in a room in the basement. Officer Gelber did not find anyone in the house. The officers then placed defendant under arrest and secured a warrant to search the house.

Robert Bulthaupt, Bell Atlantic's team leader for the 9-1-1 control center, testified that between two and five percent of all 9-1-1 calls are generated accidentally by non-human means such as by cordless phones with low batteries, answering machines, computer modems, and repair work on telephone lines. Defendant testified that he did not call 9-1-1 on the morning of June 21. His telephone bill indicated that he was using his computer modem to dial into work at 7:26 a.m., the exact time the dispatcher received the 9-1-1 call from defendant's primary telephone line. The State did not dispute that the 9-1-1 call was triggered by some accidental, non-human means, probably related to the operation of defendant's computer.

Defendant was charged in a two-count indictment with possession of marijuana, a fourth-degree offense in violation of *N.J.S.A.* 2C:35-10a(3), and operation of a premise, place, or facility used for the manufacture of marijuana, a first-degree offense in violation of *N.J.S.A.* 2C:35-4.

The trial court granted defendant's motion to suppress related to the discovery of the marijuana evidence. In rejecting the

application of the emergency aid exception as a justification for the warrantless search of defendant's home, the court found that defendant did not dial 9-1-1, and that defendant's nervous behavior and the busy signals received by the dispatcher on the callbacks as well as Officer Gelber's honest and subjective belief that an emergency existed were not sufficient to establish probable cause to search the house. The court concluded that "more compelling facts are needed to justify a warrantless search following an open line 9-1-1 call."

The Appellate Division granted the State's motion for leave to appeal and reversed the suppression order. 341 *N.J. Super.* 594, 775 *A.2d* 665 (App. Div. 2001). The appellate panel held that given the totality of the circumstances Officer Gelber had an objectively reasonable basis under the emergency aid doctrine to conduct a warrantless search of defendant's home. In reaching that conclusion, the panel afforded considerable weight to the importance of prompt police response to 9-1-1 calls and the need for police to act decisively in emergency situations.

After this Court denied defendant's motion for leave to appeal, defendant entered into a conditional plea agreement with the State, preserving the suppression issue for appeal. Defendant pled guilty to the possession of marijuana charge in exchange for the State's

pledge to dismiss the first-degree charge of operating a marijuana production facility and to recommend a noncustodial term.

In accordance with the plea agreement, the trial court sentenced defendant to a two-year probationary term on the condition that he maintain full-time employment and undergo random drug testing. The court also ordered defendant to perform fifty hours of community service, imposed $ 955 in penalties and fees, and suspended his driver's license for six months.

Defendant appealed the suppression issue and the Appellate Division summarily affirmed based on the law of the case doctrine. We granted defendant's petition for certification, 176 *N.J.* 430, 824 *A.2d* 159 (2003), and now affirm.

II.

The Fourth Amendment of the United States Constitution and Article 1, Paragraph 7 of the New Jersey Constitution prohibit "unreasonable searches and seizures" by government officials,[6] and our constitutional jurisprudence expresses a preference that those officials secure warrants issued by

6 The *Fourth Amendment to the United States Constitution* and Article I, Paragraph 7 of our State Constitution use virtually identical language. The *Fourth Amendment* provides:

neutral and detached magistrates before executing a search, particularly of a home. *Johnson v. United States*, 333 *U.S.* 10, 14, 68 *S. Ct.* 367, 369, 92 *L. Ed.* 436, 440 (1948); *State v. Sullivan*, 169 *N.J.* 204, 210, 777 *A.2d* 60 (2001); *State v. Kasabucki*, 52 *N.J.* 110, 115-16, 244 *A.2d* 101 (1968). A search conducted without a warrant is presumptively invalid, and the burden falls on the State to demonstrate that the search is justified by one of the "few specifically established and well-delineated exceptions" to the warrant requirement. *Mincey v. Arizona*, 437 *U.S.* 385, 390, 98 *S. Ct.* 2408, 2412, 57 *L. Ed. 2d* 290, 298-99 (1978) (quoting *Katz v. United States*, 389 *U.S.* 347, 357, 88 *S. Ct.* 507, 514, 19 *L. Ed. 2d 576*, 585 (1967)); *see*

[footnote 6, continued]

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> [*U.S. Const. amend. IV.*]

See also N.J. Const. art. I, para. 7.

also United States v. Karo, 468 *U.S.* 705, 717-18, 104 *S. Ct.* 3296, 3304, 82 *L. Ed. 2d* 530, 542-43 (1984); *State v. Bolte*, 115 *N.J.* 579, 585, 560 *A.2d* 644 (1989), cert. denied, 493 *U.S.* 936, 110 *S. Ct.* 330, 107 *L. Ed. 2d* 320 (1989); *State v. Alston*, 88 *N.J.* 211, 230, 440 *A.2d* 1311 (1981). Those exceptions are based on the recognition that under certain exigent circumstances a search without a warrant is both reasonable and necessary. *See*, e.g., *Chimel v. California*, 395 *U.S.* 752, 762-64, 89 *S. Ct.* 2034, 2039-41, 23 *L. Ed. 2d* 685, 694-95 (1969); *Terry v. Ohio*, 392 *U.S.* 1, 29-31, 88 *S. Ct.* 1868, 1884, 20 *L. Ed. 2d* 889, 911 (1968).

In this case, we address the contours of the emergency aid exception to the warrant requirement. The emergency aid doctrine is derived from the commonsense understanding that exigent circumstances may require public safety officials, such as the police, firefighters, or paramedics, to enter a dwelling without a warrant for the purpose of protecting or preserving life, or preventing serious injury. See *Mincey, supra*, 437 *U.S.* at 392, 98 *S. Ct.* at 2413, 57 *L. Ed. 2d* at 300; *State v. Stott*, 171 *N.J.* 343, 361, 794 *A.2d 120 (2002)*. The Fourth Amendment and Article 1, Paragraph 7 do not demand that public safety officials stand by in the face of an imminent danger and delay potential lifesaving measures while critical and precious time is expended obtaining a

warrant. See *Mincey, supra,* 437 *U.S.* at 392, 98 *S. Ct.* at 2418, 57 *L. Ed. 2d* at 300 (1978); *Stott, supra,* 171 *N.J.* at 361. We examine the conduct of those officials in light of what was reasonable under the fast-breaking and potentially life-threatening circumstances that were faced at the time. See *Terry, supra,* 392 *U.S.* at 21-22, 88 *S. Ct.* at 1880, 20 *L. Ed. 2d* at 906; see also *Earle v. United States,* 612 *A.2d* 1258, 1263 (D.D.C. 1992). We avoid viewing the events through the distorted prism of hindsight, recognizing that those who must act in the heat of the moment do so without the luxury of time for calm reflection or sustained deliberation. See *Wayne v. United States,* 115 *U.S. App. D.C.* 234, 318 *F.2d* 205, 212 (D.D.C.), cert. denied, 375 *U.S.* 860, 84 *S. Ct.* 125, 11 *L. Ed. 2d* 86 (1963); see also *State v. Leandry,* 151 *N.J. Super.* 92, 96, 376 *A.2d* 574 (App. Div.), certif. denied, 75 *N.J.* 532, 384 *A.2d* 511 (1977).

The emergency aid doctrine only requires that public safety officials possess an objectively reasonable basis to believe not certitude that there is a danger and need for prompt action. See *State v. Cassidy,* 179 *N.J.* 150, 161, 163, 843 *A.2d* 1132 (2004); *Wayne, supra,* 318 *F.2d* at 212. That the perceived danger, in fact, may not have existed does not invalidate the reasonableness of the decision to act at the time. *Cassidy, supra,* 179 *N.J.* at 161; *Wayne, supra,* 318 *F.2d* at 212.

The scope of the search under the emergency aid exception is limited to the reasons and objectives that prompted the search in the first place. See *Terry, supra,* 392 *U.S.* at 19-20, 88 *S. Ct.* at 1879, 20 *L. Ed. 2d* at 905. A police officer entering a home looking for a person injured or in danger may not expand the scope of the search by peering into drawers, cupboards, or wastepaper baskets. However, evidence observed in plain view by a public safety official who is lawfully on the premises and is not exceeding the scope of the search will be admissible. *Mincey, supra,* 437 *U.S.* at 393, 98 *S. Ct.* at 2413, 57 *L. Ed. 2d* at 300.

The rationale for the emergency aid exception is found in the oft-quoted words of Chief Justice (then Judge) Burger in *Wayne v. United States, supra*:

> [A] warrant is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. Fires or dead bodies are reported to police by cranks where no fires or bodies are to be found. Acting in

> response to reports of "dead bodies," the police may find the "bodies" to be common drunks, diabetics in shock, or distressed cardiac patients. But the business of policemen and firemen is to act, not to speculate or meditate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process. Even the apparently dead often are saved by swift police response.
>
> [318 *F.2d* at 212.]

We have adopted a three-prong test to determine whether a warrantless search by a public safety official is justified under the emergency aid doctrine. See *Cassidy, supra,* 179 *N.J.* at 161 (quoting *State v. Scott,* 231 *N.J. Super.* 258, 275, 555 *A.2d* 667 *(App. Div. 1989)* (Ashbey, J.A.D., concurring and dissenting), rev'd on dissent, 118 *N.J.* 406, 571 *A.2d* 1304 (1990)). Under that test, the public safety official must have an objectively reasonable basis to believe that an emergency requires that he provide immediate assistance to protect or preserve life, or prevent serious injury;[7] his primary

7 Although there is no need in this case to address the application of the emergency aid doctrine to the protection of property, we note

motivation for entry into the home must be to render assistance, not to find and seize evidence; and there must be a reasonable nexus between the emergency and the area or places to be searched. *Ibid.*; see also *State v. Navarro,* 310 *N.J. Super.* 104, 108, 708 *A.2d* 416 (App. Div. 1998).

Our courts have applied the emergency aid doctrine in some straightforward fact patterns. In *State v. Garbin*, a police officer responded to a home on the report of a fire. 325 *N.J. Super.* 521, 524, 739 *A.2d* 1016 (App. Div. 1999), certif. denied, 164 *N.J.* 560, 753 *A.2d* 1153 (2000). He observed smoke coming from a garage and smelled burning rubber. *Ibid.* The officer entered the garage, observed the wheels of the truck spinning rapidly, and found the driver intoxicated. *Id.* at 524, 527. The Appellate Division found that the officer's observations prior to entering the garage "could have indicated that the car was stuck in a driving gear, that the driver was unconscious or attempting to commit suicide or . . . that he was highly intoxicated." *Id.* at 527. Accordingly, the panel upheld the warrantless entry into the

[footnote continued]

> that our case law extends the doctrine to the protection of property. See *Cassidy, supra, 179 N.J. at 163.* One expects firefighters to rush into a building to put out a fire regardless of whether people are on the premises.

garage based on the officer's community caretaking function, recognizing that the officer would have been derelict had he failed to act under those circumstances. *Ibid.*

In *State v. Garland*, after a routine motor vehicle stop, a police officer seized drugs in the car and arrested the driver. 270 *N.J. Super.* 31, 37, 636 *A.2d* 541 (App. Div.), certif. denied, 136 *N.J.* 296, 642 *A.2d* 1005 (1994). The passenger, a seven-year-old girl, informed the officer that the driver was her mother's friend and that two young children had been left alone at a nearby motel, which was known by the officer for its reputation for prostitution. *Id.* at 36-38, 45. As a result of that information, police officers went to the motel room. *Id.* at 38. They knocked on the door, but received no response. *Ibid.* After hearing voices inside, the officers entered the room with the use of a key. *Id.* at 38-39. Inside they found several adults, two children, and in plain view a large quantity of cocaine. *Id.* at 39. Based on the application of the emergency aid doctrine to the warrantless entry, the Appellate Division affirmed the denial of a motion to suppress. *Id.* at 45-46.

Garbin and *Garland* are classic examples of the application of the emergency aid doctrine. In both cases, police officers either observed or received reliable information that indicated a clear and present danger. Unlike those cases, we did not find the emergency aid doctrine applicable in *State v. Cassidy,*

supra, 179 *N.J.* at 162. In that case, Natalie DeGennaro contacted the police from her place of employment concerning a history of domestic violence with the defendant, a former boyfriend. *Id.* at 153-55. As a result of that information, the police applied for and received a warrant to search defendant's home for weapons. *Id.* at 155.

We found that warrant to be procedurally defective. *Id.* at 159, 164. Alternatively, the State sought to justify the warrantless search of the defendant's home based on the emergency aid doctrine. *Id.* at 162. We rejected that application of the emergency aid doctrine because there was no clear and imminent danger, stating:

> Unlike other cases in which the emergency exception has been applied, the [defendant's] home was not the scene of domestic violence that night; there was no active altercation with defendant underway when the police arrived at that location. DeGennaro had not seen defendant in weeks, nor had he made contact with her for days. The last incident of physical violence had occurred a month previous to her report of the matter to the police. Although there was a reasonable basis to believe that relief in the form of

> restraints was necessary to provide DeGennaro with the assurance of protection, the situation was not volatile at that moment . . ., nor was the need to take immediate action at the [defendant's] home objectively apparent.
>
> [*Id.* at 163.]

In *Cassidy*, the police knew that Ms. DeGennaro was not in any immediate danger because at the time of her call to the police, she was far from the defendant and his home. *Id.* at 163-64. In contrast, in this case, Officer Gelber had a reasonable belief that some unknown person was in need of assistance in defendant's house and that any delay could have fatal consequences. Though the potential danger was inferred from the circumstances surrounding the transmission of the open line 9-1-1 call to a police dispatcher, that danger was no less real than if it had been perceived by or verbally communicated directly to Officer Gelber.

B.

In determining the legality of the search in this case, we must decide what weight to accord an open line 9-1-1 call. In assessing that issue, we first survey the purpose and use of 9-1-1 as an emergency response mechanism. 9-1-1 is "the universal emergency telephone number within the

United States for reporting an emergency to appropriate authorities and requesting assistance." 47 *U.S.C.A.* § 251(e)(3). "A 9-1-1 call is one of the most common . . . means through which police and other emergency personnel learn that there is someone in a dangerous situation who urgently needs help." *United States v. Richardson,* 208 *F.3d* 626, 630 (7th Cir.), cert. denied, 531 *U.S.* 910, 121 *S. Ct.* 259, 148 *L. Ed. 2d* 188 (2000); see also *United States v. Holloway,* 290 *F.3d* 1331, 1339 (11th Cir. 2002) ("911 calls are the predominant means of communicating emergency situations."), cert. denied, 537 *U.S.* 1161, 123 *S. Ct.* 966, 154 *L. Ed. 2d* 897 (2003).

New Jersey has a detailed statutory and regulatory scheme for the implementation of the 9-1-1 system throughout the State.[8] See *N.J.S.A.* 52:17C-1 to -16; *N.J.A.C.* 17:24-1.1 to -11.4. See also *N.J.S.A.* 52:17C-3a, -3b, -8a (establishing Office of Emergency

8 The regulations provide "operational standards," including requirements that all 9-1-1 answering centers have "no more than one busy signal in 100 call attempts in the average busiest hour"; all answering centers "operate[] on a full-time basis, 24 hours a day, seven days a week"; and all 9-1-1 calls be "answered in 10 seconds, except that 10 percent of the calls received during the average busiest hour may be answered within 20 seconds." N.J.A.C. 17:24-2.3. The regulations also require the word "EMERGENCY" to appear whenever

Telecommunications Services to implement "an enhanced 9-1-1 system," to "explore ways to maximize the reliability of the system," and to expedite communications of emergencies to "law enforcement, fire fighting, emergency medical services, or other emergency services"). Telephone companies are required to forward the telephone number and street address of any telephone used to place a 9-1-1 call to 9-1-1 dispatchers "for the purpose of responding to emergency calls." *N.J.S.A.* 52:17C-10a. Upon receiving such a call, the dispatcher must answer with a response such as "9-1-1, where is the emergency?" *N.J.A.C.* 17:24-2.3(a)(5). "The police maintain records of 9-1-1 calls not only for the purpose of responding to emergency situations but to investigate false or intentionally misleading reports." *State v. Golotta,* 178 *N.J.* 205, 219, 837 *A.2d* 359 (2003); see also *N.J.S.A.* 52:17C-10a. Moreover, the use of 9-1-1 to falsely report an emergency is a crime. *N.J.S.A.* 2C:33-3e (providing that "[a] person is guilty of a

[footnote continued]

> 9-1-1 is displayed so as "to promote the proper use of 9-1-1 services," N.J.A.C. 17:24-10.2(b)(2), and require anyone who publishes a telephone listing that includes emergency numbers to "list '9-1-1' as the only 'Emergency' number," N.J.A.C. 17:24-10.1.

crime of the fourth degree if the person knowingly places a call to a 9-1-1 emergency telephone system without purpose of reporting the need for 9-1-1 service"). A 9-1-1 call carries "a fair degree of reliability," because "it is hard to conceive that a person would place himself or herself at risk of a criminal charge by making such a call," unless there was a true emergency. *Golotta, supra,* 178 *N.J.* at 219 (internal quotation marks omitted).

More than ninety-five percent of all 9-1-1 calls received by police departments are a result of a person dialing that number. That only two to five percent of such calls are generated accidentally by non-human means in no way diminishes the probability that a 9-1-1 call is the signal of an emergency. See *Richardson, supra,* 208 *F.3d* at 630 ("Many 911 calls are inspired by true emergencies that require an immediate response."). An open line 9-1-1 call, by its very nature, may fairly be considered an SOS call, a presumptive emergency, requiring an immediate response. That presumption must apply because the dispatcher does not know whether the caller is a stroke or heart attack victim, a child in need of assistance, a person overcome by smoke or, more generally, a person whose life is endangered but unable to speak. That presumption is rebuttable and may be dispelled by any number of simple

explanations given by the homeowner to the responding police officer. A mother may explain that her child, who appears at the door with her, impishly dialed the number. A resident, who otherwise raises no suspicions, may state that he intended to call 4-1-1 but pushed the wrong digit and due to distraction inadvertently left the telephone off the hook. Those circumstances when viewed in their totality would likely persuade a reasonable police officer that there is no need for further investigation. Conversely, the circumstances confronting the public safety official may corroborate the existence of an emergency. For example, smoke escaping from under a door might be a clear sign of a fire.

We reject the State's request that we "find, as a matter of law, that the receipt of a 9-1-1 open-line, abandoned or hang-up call alone gives the police the 'reasonable belief' grounds necessary to enter a home to investigate the nature of the emergency." (Emphasis added.) Likewise, we cannot accept defendant's position that an open line 9-1-1 call, followed by callbacks by the dispatcher that only elicit busy signals and a visit to the home by a police officer whose knock on the door goes unanswered, would never be sufficient to justify entry as part of the officer's emergency care-taking function. We eschew the absolute positions advanced by both the State and defendant for a more nuanced approach that properly weighs the

competing interests under a totality of the circumstances standard.

It does not require a flight of imagination to picture circumstances in which a person who suddenly takes ill dials 9-1-1 and is incapacitated and unable to speak. The police officer at the door, of course, cannot know what type of emergency, if any, lies inside all he knows is that the caller has dialed an emergency response number. In light of the presumptive emergency, we cannot conclude that the officer is bound to ignore the warning and walk away. Each case must be decided on the totality of the circumstances confronted by the public safety official, who must weigh the competing values at stake, the privacy interests of the home versus the interest in acting promptly to render potentially life-saving assistance to a person who may be incapacitated. There is no bright line or magic formula to be applied across the board. A fact-sensitive analysis must be applied to each case.

C.

Several out-of-state cases that have addressed comparable exigent situations involving the emergency aid doctrine are informative to our resolution of the present case.[9] In *People v. Greene*, 289 *Ill. App. 3d*

9 In addition to the cases discussed below, see *United States v. Richardson, supra*, 208 *F.3d* at 627-28, 631 (upholding warrantless search

796, 799, 682 *N.E.2d* 354, 224 *Ill. Dec.* 793 (Ill. App. Ct. 1997), a police dispatcher received a 9-1-1 hang-up call and on redial was connected with an answering machine. The dispatcher sent officers to the residence identified with the call. *Id.* at 800. After the officers knocked on the screen door to the defendant's porch and received no response, they opened that door and proceeded to the front door. *Id. at 800, 803.* Although it was disputed whether the officers broke the eyehook that locked the door, *id.* at 799, 801, the appellate court found that the officers made "a peaceful entry onto the porch,"

[footnote continued]

> of defendant's home because, although 9-1-1 call reported that body of woman who had been raped and murdered could be found in defendant's basement, police did not have to presume woman was dead); *State v. Greene, 162 Ariz. 431, 432, 784 P.2d 257 (Ariz. 1989)* (upholding officer's warrantless entry into defendant's apartment based on receipt of "a 'family fight-domestic violence' call"); *State v. Lynd, 54 Wash. App. 18, 19, 771 P.2d 770 (Wash. Ct. App. 1989)* (upholding warrantless search under emergency aid exception where dispatcher received 9-1-1 hang-up call and busy signal on callback, and defendant admitted that he and his wife had been engaged in incident of domestic violence and claimed his wife was no longer at home).

which was "justified" for the purpose of making contact with the resident, *id.* at 803. Through the front door's window, the officers observed the defendant seated on a couch in the living room. *Id.* at 800. After the officers knocked on the door and announced their presence, the defendant walked to the door, engaged the dead bolt lock, and returned to the couch, apparently hiding something under a cushion. *Id.* at 800, 803. The officers persisted in knocking on the door until the defendant answered. *Id.* at 800. The officers then told the defendant that they had received a 9-1-1 call from his house, to which the defendant replied that he had not called 9-1-1 and that he was alone in the house.[10] *Ibid.* Upon entering the defendant's home, the odor of burning marijuana was strong, and one of the officers proceeded to lift the couch cushion under which the officers had observed the defendant secrete an unknown object, possibly a weapon. Ibid. The officer discovered a small quantity of marijuana. *Id. at 799-800.* The court found that entry into the house, even absent consent, was justified under the emergency aid doctrine. *Id. at 803.* The court concluded that the totality of the circumstances "made it reasonable for the

10 The defendant later claimed that he may have inadvertently dialed 9-1-1 while attempting to dial area code 901. *Id.* 289 *Ill. App. 3d* at 800.

police to believe that someone within the house was attempting to call 911 for help but was prevented from completing the call." *Ibid.*

In *State v. Pearson-Anderson,* 136 *Idaho* 847, 848, 41 *P.3d* 275 (Idaho Ct. App. 2001), a 9-1-1 emergency operator traced a hang-up call to the defendant's home. When the operator redialed the telephone number that originated the 9-1-1 call, someone picked up the line and immediately hung up. *Ibid.* Two police officers were dispatched to the residence and observed the defendant and her live-in boyfriend wrestling on the floor across the threshold of the backdoor. *Ibid.* After separating the two combatants, defendant told one of the officers that "the fight arose because [her boyfriend] had given a key to the home to another woman," who had entered and damaged some of the defendant's belongings. *Ibid.* She also related that "the other woman had been there 'earlier,'" but had left. *Ibid* One of the officers decided to enter the home to determine whether any third parties were in need of assistance. *Id.* at 849. Although he found no one in distress, he happened upon a methamphetamine factory. *Ibid.* The court reasoned that the initial 9-1-1 hang-up call and the redial hang up "suggested that someone in the home who was in need of help had been prevented by another person from communicating with the operator." *Id.* at 850. The court rejected the defendant's

invitation to hold that responding police officers must take the word of a person at the scene who offers a seemingly plausible explanation for the hang up and gives assurances that no one is in distress. *Ibid.* The court concluded that the entry was reasonable in light of the totality of the circumstances. *Id.* at 851.

In *United States v. Barone,* 330 *F.2d* 543, 544 (2d Cir. 1964), cert. denied, 377 *U.S.* 1004, 84 *S. Ct.* 1940, 12 *L. Ed. 2d* 1053 (1964), several New York City patrolmen heard "loud screams in the dead of night" coming from a rooming house. The officers knocked on the door to the room from which the screams had emanated and were greeted by two women, both of whom denied knowledge of the cause of the screams, though one suggested that she might have suffered a nightmare. *Ibid.* After the officers observed the defendant emerge from a bathroom in the wake of the sound of a flushing toilet, they entered that room and found in plain view counterfeit currency. *Ibid.* The court upheld the search, concluding that the officers had reason to believe that someone within the apartment was the victim of an assault. *Ibid.* The court in applying the emergency aid doctrine found that "had the patrolmen been denied entry to the apartment they would have had the right, if not the duty, to gain entry forcibly." *Id.* at 545. The court concluded that the search to find the cause of the screaming "would have

been incomplete without finding out who might be in the bathroom and whether anyone there might be in need of aid." *Ibid.*

Certain general principles may be distilled from those cases. A 9-1-1 call is tantamount to a distress call even when there is no verbal communication over the telephone to describe the nature of the emergency. The responding police officer is not required to accept blindly the explanation for the 9-1-1 call offered by the resident answering the door, but must base his decision on the totality of the circumstances. Courts are loath to second-guess decisions made in good faith with the intent of protecting life when the circumstances clearly reveal a legitimate emergency that will not abide delay.

III.

Against this legal backdrop, we analyze the facts before us. The police dispatcher received an open line 9-1-1 call from a telephone number listed in defendant's name and then after dialing back that number heard only a busy signal. The dispatcher acted promptly when she could not make contact with the person who initiated the 9-1-1 call. Officer Gelber proceeded to defendant's home to investigate. From the officer's perspective, as a result of the open line 9-1-1 call and the inability to make contact with the caller, he had a duty to presume there was an emergency. In

response to Officer Gelber's knock at the door, defendant responded by poking his head from behind a sheet that obstructed a view of the interior of the house and then advising the officer that he lived alone and did not make the call. The failure of defendant to give a reasonable account for the call at that time naturally aroused the suspicion of the officer. The dispatcher's second call to the house, which yielded another busy signal, reinforced in the officer's mind the very real potential that a victim was incapacitated in the home. In addition, Officer Gelber noted that defendant was unusually nervous and agitated and stumbling over his words when first asked to explain the occurrence of a 9-1-1 call from his home. Officer Gelber did not have to give uncritical acceptance to defendant's belated explanation that his computer modem may have caused a false 9-1-1 transmission or to defendant's demonstration that he could call without a busy signal from one cordless telephone to another. Upon reentering his home, defendant could have retrieved the telephone from a victim rendered helpless.

That there are a small percentage of non-human generated 9-1-1 calls and 9-1-1 calls that are made inadvertently does not place in doubt the overall reliability of the 9-1-1 emergency response system or lessen the significance of any one open line call. Public safety officials must respond to every open line 9-1-1 call as though a true

emergency is unfolding. We must decide whether Officer Gelber was "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted" his entry into defendant's home under the emergency aid doctrine. *Terry, supra,* 392 *U.S.* at 21, 88 *S. Ct.* at 1880, 20 *L. Ed. 2d* at 906. As in *Greene, supra,* 289 *Ill. App. 3d* at 803, and *Pearson-Anderson, supra,* 136 *Idaho* at 850, Officer Gelber was entitled to conclude that the person who attempted to make the 9-1-1 call may have been prevented from completing the call and was in need of emergency assistance. We find that Officer Gelber had an objectively reasonable and good-faith basis to believe that an emergency was at hand that could not brook delay. Moreover, we find that the officer's motivation for entering the home was transparent to ensure that a victim was not lying somewhere within the house. There was no credible evidence that the officer harbored the ulterior motive of hunting for evidence of a crime to pin against defendant. The scope of Officer Gelber's search was limited to the emergent mission looking into areas where a person or body could be located. The officer could not ignore the evidence of drug activity that he observed in plain view. See *Mincey, supra,* 437 *U.S.* at 393, 98 *S. Ct.* at 2413, 57 *L. Ed. 2d* at 300. Both the basis for and scope of the search were within constitutional bounds

and, therefore, the motion to suppress should have been denied.

In affirming the Appellate Division and upholding the search, we give no weight to Officer Gelber's testimony that a resident had never before declined to grant him entry to a home when he was responding to a 9-1-1 call, or that defendant told the officer that he could not enter without a search warrant, or that defendant asked if he needed a lawyer. A homeowner has a right under our federal and state constitutions to insist that a police officer obtain a warrant before entering and searching his house. See *State v. Bolte, supra,* 115 *N.J.* at 583-84; see also *Schneckloth v. Bustamonte,* 412 *U.S.* 218, 219, 93 *S. Ct.* 2041, 2043-44, 36 *L. Ed. 2d* 854, 858 (1973) (discussing consent exception to warrant requirement); *State v. Suazo,* 133 *N.J.* 315, 319-20, 627 *A.2d* 1074 (1993) (same). The assertion of that constitutional right, which protects the most basic privacy interests of our citizenry, is not probative of wrongdoing and cannot be the justification for the warrantless entry into a home. See *United States v. Alexander,* 835 *F.2d* 1406, 1409 n.3 (11th Cir. 1988) (stating that "defendant's refusal to consent to search cannot establish probable cause to search"); *United States v. Prescott,* 581 *F.2d* 1343, 1350 (9th Cir. 1978) (stating that defendant's refusal to consent to entry and search by police officers "cannot be a crime" and cannot "be evidence of a crime"); see also Craig S. Lerner, The Reasonableness

of Probable Cause, 81 *Tex. L. Rev.* 951, 966 (2003) (noting that courts "have suggested that allowing the police to weigh a refusal to consent impermissibly 'burdens' the exercise of the Fourth Amendment right to be free from unreasonable searches"). While we in no way suggest that the public should not cooperate with the police, a person's assertion of a constitutional right should not be used to cast suspicion on him and serve as the excuse to diminish that right.

This is a close case and the unique facts that justified the warrantless search of defendant's home should not be over read. The sanctity of one's home is among our most cherished rights. *State v. Bruzzese,* 94 *N.J.* 210, 217, 463 *A.2d* 320 (1983), cert. denied, 465 *U.S.* 1030, 104 *S. Ct.* 1295, 79 *L. Ed. 2d* 695 (1984). The very core of the Fourth Amendment and Article 1, Paragraph 7 protects the right of the people to be safe within the walls of their homes, free from governmental intrusion. *Kyllo v. United States,* 533 *U.S.* 27, 31, 121 *S. Ct.* 2038, 2042, 150 *L. Ed. 2d* 94, 100 (2001). The privacy interests of the home are entitled to the highest degree of respect and protection within our constitutional framework. *State v. Evers,* 175 *N.J.* 355, 384, 815 *A.2d* 432 (2003); see also *Bolte, supra,* 115 *N.J.* at 583-85; *Bruzzese, supra,* 94 *N.J.* at 217. But there are limited exceptions to the warrant requirement when the duty to preserve and protect life and the need to act decisively and

promptly must outweigh the privacy interests of an individual. This case presents one such example.

IV.

We conclude that the totality of the circumstances justified the warrantless entry into defendant's home under the emergency aid doctrine. For those reasons, we affirm the judgment of the Appellate Division reversing the grant of the motion to suppress evidence.

CHIEF JUSTICE PORITZ and JUSTICES LONG, LaVECCHIA, and ZAZZALI join in JUSTICE ALBIN's opinion. JUSTICE WALLACE filed a separate, dissenting opinion. JUSTICE VERNIERO did not participate.

JUSTICE WALLACE dissenting.

For the first time our Court condones a warrantless search of a home under the emergency aid doctrine based on an open line 9-1-1 call. I cannot agree, and therefore I respectfully dissent.

Both the Fourth Amendment of the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution protect citizens against unreasonable searches and seizures by requiring warrants to be issued on probable cause. Any warrantless search is considered invalid until the State shows that the warrantless search "falls within one of the

few well-delineated exceptions to the warrant requirement." *State v. Dangerfield,* 171 *N.J.* 446, 455, 795 *A.2d* 250 (2002) (citations and quotation marks omitted).

"An individual's privacy interests are nowhere more clearly defined or rigorously protected by the courts than in the home[,] the core of Fourth Amendment rights." *State v. Johnson,* 168 *N.J.* 608, 625, 775 *A.2d* 1273 (2001) (citation and quotation marks omitted) (alteration in original). Therefore, "[a] warrantless search of a person's home 'must be subjected to particularly careful scrutiny.'" *State v. Cassidy,* 179 *N.J.* 150, 160, 843 *A.2d* 1132 (2004) (quoting *State v. Bolte,* 115 *N.J.* 579, 583, 560 *A.2d* 644, cert. denied, 493 *U.S.* 936, 110 *S. Ct.* 330, 107 *L. Ed. 2d* 320 (1989)). This Court set out the heavy burden that the State bears when justifying a warrantless entry and search of a home by stating:

Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. Accordingly, it is well established that searches and seizures inside a home without a warrant are presumptively unreasonable, and hence prohibited by the Fourth Amendment, absent probable cause and exigent circumstances.

[*State v. Hutchins,* 116 *N.J.* 457, 463, 561 *A.2d* 1142 (1989)(citations and quotation marks omitted).]

Recently, the United States Supreme Court also emphasized that principle. "At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion. With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United States,* 533 *U.S.* 27, 31, 121 *S. Ct.* 2038, 2041-42, 150 *L. Ed. 2d* 94 (2001) (citation and quotation marks omitted).

"The 'emergency aid' doctrine is an exception to the warrant requirement." *State v. Scott,* 231 *N.J. Super.* 258, 274, 555 *A.2d* 667 (App. Div. 1989) (Ashbey, J.A.D., concurring and dissenting), rev'd on dissent, 118 *N.J.* 406, 571 *A.2d* 1304 (1990). To satisfy that exception, the State must show three elements: "'(1) the existence of an emergency as viewed objectively[;] (2) a search not motivated by a desire to find evidence[;] and (3) a nexus between the search and the emergency.'" *Cassidy, supra,* 179 *N.J.* at 161 (quoting *Scott, supra,* 231 *N.J. Super.* at 275). In determining whether the first prong of that three-part test is met, we have explained that an emergency situation exists only when police officers, firefighters or other public officials "are confronted with evidence which would lead a prudent and reasonable official to see a need to act on that information, even if ultimately

found erroneous." *Id.* at 161. Stated another way, "the question is would the officers 'have been derelict in their duty had they acted otherwise.'" *Id.* at 163 (citation omitted).

In Cassidy, we recently addressed application of the emergency aid exception when the State seized weapons following a domestic violence dispute under *N.J.S.A.* 2C:25-21d. *Id.* at 162-63. There, we explained that although *N.J.S.A.* 2C:25-21d allowed for the removal of weapons from the premises of a domestic violence situation if an officer believes the victim is in danger, there was no emergency that justified the invasion of the defendant's home because: (1) his home was not the scene of domestic violence that night; (2) there was no active altercation underway when police arrived; (3) the domestic violence incident complained of had occurred a month prior to the search; and (4) the parties had not been in contact for several days prior to the search. *Id.* at 163-64. Thus, we refused to expand the emergency aid exception and adhered to this State's tradition of applying that exception only when there is a reasonable basis to believe an emergency existed. *Id.* at 163; see also *State v. Garbin*, 325 *N.J. Super.* 521, 526-27, 739 *A.2d* 1016 (App. Div. 1999) (holding warrantless entry into garage permissible because of smoke emanating from structure), certif. denied, 164 *N.J.* 560, 753 *A.2d* 1153 (2000); *State v. Garland*, 270 *N.J. Super.* 31, 45-46, 636 *A.2d* 541 (App. Div.) (allowing search of hotel room

when police were told that children were left alone and search was focused on ascertaining their whereabouts and welfare), certif. denied, 136 *N.J.* 296, 642 *A.2d* 1005 (1994).

After analyzing the totality of circumstances here, I find insufficient evidence to demonstrate that there were reasonable grounds to believe an emergency existed in defendant's home. The police did act reasonably when they responded to the open line 9-1-1 call that originated from defendant's home because they did not know whether the call was an emergency or not. However, once defendant denied making the 9-1-1 call and offered a reasonable explanation for the call, the police no longer had a reasonable basis to believe someone was in need of assistance. Although Gelber claimed that his suspicion was heightened by defendant's nervousness and his refusal to consent to a home search, neither of these grounds has ever been considered sufficient to overcome the heavy burden of justifying a warrantless search of a person's home in this State. See *State v. Lund,* 119 *N.J.* 35, 47-48, 573 *A.2d* 1376 (1990) (holding nervousness alone was insufficient to create probable cause to search without warrant); *District of Columbia v. Little,* 339 *U.S.* 1, 7, 70 *S. Ct.* 468, 471, 94 *L. Ed.* 599 (1950) (holding refusal to consent can never be used as evidence of a crime).

Further, the second test telephone call to the open line that resulted in a busy signal provided no additional justification under the totality of the circumstances analysis. First and most significant, defendant cooperated, quickly retrieved two portable phones, and demonstrated that the line rang. Second, there are countless reasons a telephone line might ring busy, including that it was a dedicated computer line. Third, there had been no prior distress calls from defendant's address. Fourth, as noted in footnote three of the majority opinion, the dispatcher had received three other open line 9-1-1 calls of unknown origin in that shift alone. Like Cassidy, there was no contemporaneous request for assistance or any other reasonable indication that someone inside the home was in need of assistance once defendant cooperated. Under those circumstances, Gelber would not have been "derelict in his duty" if he did not search defendant's home at that point, because his investigation produced no corroborating evidence to support a reasonable belief that someone inside was in need of assistance. Thus, any belief in a potential emergency was reduced to a mere hunch and any further search required a warrant.

Although I agree with the majority opinion that this is a close case, I disagree that the State met its heavy burden to justify the warrantless search of defendant's home.

Because I conclude the evidence here was insufficient to justify such a search, I would reverse the judgment of the Appellate Division and reinstate the judgment of the Law Division granting defendant's motion to suppress.

STATE OF NEW JERSEY, Plaintiff-Appellant,
v.
GARY N. FRANKEL, Defendant-Respondent.

A-6544-99T1F

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

December 19, 2000, Argued
July 2, 2001, Decided

JUDGES: Before Judges Stern, Collester and Fall. COLLESTER, J.A.D.

Pursuant to leave granted, the State appeals from an order of the Law Division granting defendant's motion to suppress evidence. We reverse.

On December 28, 1999, a Monmouth County Grand Jury indicted defendant, Gary Frankel, on charges of possession of marijuana in the fourth degree, contrary to the provisions of N.J.S.A. 2C:35- 10a(3), and operating a marijuana production facility, a crime of the first degree, contrary to the provisions of *N.J.S.A. 2C:35-4.*

Defendant filed a motion to suppress evidence. The salient facts testified to at the suppression hearing are that on June 21, 1999, at 7:26 a.m. Freehold Township Police Dispatcher Darling Ecko received a 9-1-1 call from the phone line of 732-625-0590. When

Ecko answered the phone, no one was on the line, and all she heard was static. She described such a call as an "open line" call and related that during her early morning shift she had received three other open line 9-1-1 calls from two other residences: one at 12:20 a.m.; one at 3:05 a.m.; the other at 7:06 a.m. When the 7:27 a.m. call came from defendant's phone line, Ecko exclaimed on the tape monitoring the call: "This is ridiculous. It's three separate residences in the town. I've never had this happen before. Hello?"

Ecko dispatched Patrolman Russell Gelber to check out the open line call at 175 Siloam Avenue, the address shown on her computer screen for the origin of the call. Gelber arrived at the address within ten minutes. He saw no vehicles outside and at first thought that the house was empty. A white sheet behind the screen door blocked the view inside.

After Gelber knocked, the defendant looked out from behind the sheet. Gelber told him that a 9-1-1 call had been made from the residence and that no one was on the line when the call was answered. Defendant replied that he made no such call. When Gelber asked if someone else could have made the call, the defendant said that he lived alone.

Gelber testified that the defendant was extremely nervous and was tripping over his

words, which in turn made Gelber nervous since he could not see what, if anything, the defendant was doing behind the sheet. He asked the defendant to step outside the house and patted him down for weapons, finding nothing. Gelber then asked if he could step inside the residence to make sure everything was all right. Defendant refused to permit entry and repeatedly denied making the 9-1-1 call. He added that he was a computer consultant and that the 9-1-1 call must have been a computer error. Gelber said the defendant seemed "totally shocked" at his suggestion that he enter to make sure that no one was in trouble. Defendant started to panic, asked whether he needed a lawyer, and said that Gelber could not enter without a search warrant.

Gelber said that never before had anyone refused him entry when he responded to a 9-1-1 call. Along with defendant's anxiety the denial by defendant led Gelber to fear that someone inside was in danger. Accordingly, he called for backup.

While he waited, Gelber told defendant that the 9-1-1 call had been traced to his residence. Defendant confirmed the phone number and suggested that since he was on the computer earlier that morning, the computer may have inadvertently dialed 9-1-1. To check out that possibility, Gelber called the dispatcher and asked her to call the number of the 9-1-1 call. While waiting

for the result, Gelber asked whether there was something inside the house that defendant did not want him to see. Defendant said there was some "sexual stuff" and that he was embarrassed about it.

The dispatcher called Gelber back and told him that the phone line in question was busy, which made Gelber even more concerned that someone was in the house needing assistance. The defendant said he would go inside to show the officer that the phone was operational and not being used. He allowed Gelber to step into the foyer, and Gelber next saw the defendant run down the hallway out of sight. Within seconds he reappeared with two cordless phones. He was speaking to his mother on one, telling her that the police wanted to enter his house. Defendant then hung up and used one cordless phone to call the number which was traced to the 9-1-1 call, the other cordless phone rang. Gelber then told defendant that the demonstration only showed that the phone line was in working order, but it still did not explain either the 9-1-1 call or the subsequent busy signal.

At this point, Officer Dean Smith arrived as Gelber's backup was briefed on the situation. Gelber told Smith that he was not satisfied with the defendant's explanation, was concerned by defendant's agitated behavior and believed that someone in the residence might need help. He then told

defendant that they were going to walk through the residence to make sure that there was no one inside the residence in need of assistance. He added that he would not look in any drawers or check any of defendant's personal property.

The officers entered, walked into rooms and opened closets. In one closet Gelber saw a tray of marijuana. He arrested defendant and left him with Officer Smith while continuing to walk into remaining rooms. In the bathroom he saw a terrarium of marijuana in plain view. While walking to the basement, he smelled raw marijuana and saw an elaborate water system with several grow lights and marijuana plants. No other person was in the house. Defendant was taken to police headquarters, and a search warrant was issued for the residence.

Defendant testified that he was in his kitchen when Gelber knocked at his door. He admitted being anxious, fearing that the officer was there to tell him of a family tragedy or accident. He said he was shocked and humiliated when Gelber patted him down on his front stoop and quoted Gelber as saying he wanted to enter "to look for bodies." According to defendant, there was nothing he could tell the officer to prevent him from invading his privacy.

Dispatcher Ecko testified that during the 11:00 p.m. to 8:00 a.m. shift on June 21, 1999, a few 9-1-1 calls were received during

the night. She said that when a phone call comes from a residence, the name of the phone subscriber and the residence appears on her computer screen. The standard procedure was to dispatch an officer to investigate all open 9-1-1 calls. She said that she had not told Gelber of the three other open line 9-1-1 calls that evening when she dispatched him to the defendant's residence.

Robert Bulthraupt, an expert witness employed by Bell Atlantic as a Team Leader for a 9-1-1 control center, testified as to a number of situations where non-human 9-1-1 calls were generated, such as from phones with low batteries, answering machines, technician line errors and computer modems. He opined that technical problems resulted in "false" 9-1-1 calls of up to five percent of those received by dispatchers.

Defendant's phone records disclosed that his computer dialed out on the 732-625-0590 line via modem at 7:26 a.m., the exact time that the 9-1-1 call was received by Ecko. The motion judge thereby concluded that defendant did not deliberately make a 9-1-1 call, and the State does not dispute that conclusion.

The motion judge implicitly found the testimony of Patrolman Gelber credible, specifically finding that Gelber was unaware of any prior open line 9-1-1 calls, that he felt defendant's manner was anxious, that he

sought to enter the house for a "walk-through" for the purpose of determining if anyone was in need of assistance, and that he called the dispatcher to request a follow-up call to the house phone which resulted in a busy signal. Nonetheless, the motion judge held that the State did not set forth sufficient proof of probable cause of "exigent circumstances" to justify the warrantless search.

On appeal the State does not argue the exigent circumstances exception for a warrantless search but rather that the actions of the officers entering into defendant's home were justified by the community care-taking function of police to enter and investigate reports of an emergency. See *State v. Scott,* 231 *N.J. Super.* 258, 274-75, 555 *A.2d* 667 (App. Div. 1989) (Ashbey, J., concurring and dissenting), rev'd, 118 *N.J.* 406, 571 *A.2d* 1304 (1990); *United States v. Barone,* 330 *F.2d* 543, 545 (2nd Cir.), cert. denied, 377 *U.S.* 1004, 84 *S. Ct.* 1940, 12 *L. Ed. 2d* 1053 (1964). This right of entry is to be distinguished from the police activity of investigating and accumulating evidence relating to violations of criminal law. *State v. Navarro,* 310 *N.J. Super.* 104, 108, 708 *A.2d* 416 (App. Div. 1998).

Under this so-called "emergency aid doctrine" the right of police entry is separate and apart from the question of whether there is probable criminal activity within the

premises. See *State v. Leandry,* 151 *N.J. Super.* 92, 96, 376 *A.2d* 574 (App. Div. 1977). As with medical emergency units, fire departments and other emergency workers, police response to an emergency is not encumbered by a need for judicial approval and issuance of a warrant before action may be taken. Where there is a reasonable belief that someone is in need of immediate aid, the police may enter premises and investigate without a warrant to the extent necessary to quell that fear, in light of the nature of the perceived emergency. Any contraband or evidence of a crime observed in plain view may be seized without regard to probable cause. See, e.g., *State v. Hill,* 115 *N.J.* 169, 173, 557 *A.2d* 322 (1989); *State v. Garland,* 270 *N.J. Super.* 31, 44-46, 636 *A.2d* 541 (App. Div. 1994); *State v. Castro,* 238 *N.J. Super.* 482, 487-89, 570 A.2d 40 (App. Div. 1990).

To justify a warrantless search under the emergency aid doctrine the State must satisfy the following three-pronged test:

(1) there must be a reasonable and objective basis to believe that an emergency exists; (2) the resulting search must not be motivated by a desire to find evidence of a crime; and (3) there must be a nexus between the search and the emergency. See *Garland, supra,* 270 *N.J. Super.* at 44; *Scott, supra,* 231 *N.J. Super.* at 275.

The United States Supreme Court defined the emergency aid exception to the warrant requirement as follows:

> We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid... The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. [Citations omitted.]
>
> [*Mincey v. Arizona*, 437 *U.S.* 385, 392, 98 *S. Ct.* 2408, 2418, 57 *L. Ed. 2d* 290, 300 (1978).]

9-1-1 is the simplest and most effective means for citizens to call for emergency police services. Public reliance upon the 9-1-1 system is great. The public policy of this State gives due recognition to 9-1-1 emergency calls and prompt police action. See, e.g., *N.J.S.A.* 52:17C-1 et seq.; *N.J.A.C.* 17:24-2.3 et seq. Common sense and experience illustrate the need for prompt and

appropriate police action to 9-1-1 calls, even those that are open-ended.

Defendant acknowledges that a 9-1-1 call warrants a police response. However, he argues that because mechanical failures, computer "glitches" or the like generates a percentage of erroneous 9-1-1 calls, a probable cause standard is mandated to enter someone's home. We disagree. As stated by former Chief Justice (then judge) Burger in *Wayne v. United States,* 115 *U.S. App. D.C.* 234, 318 *F.2d* 205, 212 (D.C. Cir.), cert. denied, *375* U.S. *860, 84* S. Ct. *125, 11* L. Ed. 2d *86 (1963):*

> fires or dead bodies are reported to the police by cranks where no fires or bodies are to be found... but the business of policemen and firemen is to act, not to speculate or meditate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process. (Emphasis in the original.)

We hold that the possibility of computer error, fraud or false emergency reports in 9-1-1 calls is insufficient to suppress evidence observed in plain view during a police officer's entry in response to a perceived emergency when the officer has acted reasonably and prudently.

While no New Jersey case specifically applies the emergency aid doctrine to a 9-1-1 call, analogous case law supports its application. See *State v. Garbin*, 325 *N.J. Super.* 521, 739 *A.2d* 1016 (App. Div. 1999), certif. denied, 164 *N.J.* 560, 753 *A.2d* 1153 (2000) (holding that police officers were justified in entering defendant's garage based on observations of smoke from the garage and wheels of a truck rapidly spinning); *Navarro, supra*, 310 *N.J. Super.* at 109, (holding it permissible for a police officer to accompany a landlord into defendant's apartment to retrieve defendant's gun to protect the landlord and children from injury); *Scott, supra*, 231 *N.J. Super.* at 277 (finding that the emergency aid doctrine permitted a warrantless search in a domestic violence situation); *Leandry, supra*, 151 *N.J. Super.* at 96 (holding that the emergency aid doctrine permitted the warrantless search of a residence based on calls from an informant indicating that a person inside had been shot was recuperating. Officers observed a hospital bed inside the house, and a broken pane of glass in a door).

We do not hold that a 9-1-1 call relieves law enforcement of its constitutional obligations or dilutes individual Fourth Amendment rights. Searching inquiry must be made as to whether the action taken was pursuant to a reasonable and objective belief of an emergent situation as opposed to an

attempt to obtain evidence of a crime and whether the resulting entry and search were properly circumscribed by the nature of the perceived emergency.

In the case at bar Officer Gelber acted reasonably and prudently when confronted with a situation of unknown dimension and risk. He did not force his way into the premises but called the dispatcher to further investigate his concern that someone else was inside despite defendant's denials. When a busy signal was reported on the same phone from which the 9-1-1 call emanated, it became the officer's obligation to determine if someone within was in distress. His actions were objectively reasonable, and his search of the premises was properly circumscribed by the nature of the perceived emergency. Therefore, the State satisfied all the requisite elements under the emergency aid doctrine to justify entry into defendant's house without a warrant, and the evidence observed in plain view was properly seized.

Reversed and remanded.

Superior Court of New Jersey
Law Division - Criminal
Monmouth County

STATE OF NEW JERSEY,
Plaintiff,

V. Indictment No. 99-10-1978

GARY FRANKEL,
Defendant.

Decided: June 23, 2000

CHAIET, J.S.C.

This motion to suppress involves the question of whether a warrantless search of the defendant's residence, following an "open line" 9-1-1 call, was justified under the "exigent circumstances" exception to the warrant requirement.

I.

On October 28, 1999, a Monmouth County Grand Jury returned an indictment charging the defendant, Gary Frankel, with one count of possession of marijuana in violation of N.J.S.A. 2C:35-10a(3), a fourth degree crime, and one count of maintaining or operating a controlled dangerous substance production facility in

violation of NJ.S.A, 2C:35-4, a first degree crime. The indictment resulted from a search of the defendant's home on June 21, 1999 by officers of the Freehold Township Police Department The officers were at the home of the defendant, 175 Siloam Road, because of a 9-1-1 call received by the Freehold Township Police Department at 7:27 a.m. from that address. The defendant filed this motion to suppress on January 10, 2000, alleging that the police entry without a warrant constituted an unreasonable search.

On June 8, 2000, the court heard testimony as to the events of June 21, 1999. At approximately 7:26 a.m. a 9-1-1 call was made from (732) 625-0590, one of the defendant's phone lines. The call was received by Freehold Township dispatcher Darlene Ecko (formerly Thompson) at 7:27 a.m. Ms. Ecko described it as an "open line" call, meaning that when she picked up the phone, nobody was on the line. She stated that when she answered the call, all she heard was static. Ms. Ecko further testified that she had received three "open line" 9-1-1 calls from two other residences earlier that morning, one at 12:20 a.rn., one at 3:05 a.m. and the other at 7:06 a. m.. When she received the 9-1-1 call from the defendant's residence, she was clearly frustrated, as indicated by the tape recording of the 7:27 a.m. call wherein she exclainied, "This is ridiculous it's three different residences in the town, I've never had this happen before, Hello?"

At 7:32 a.m. Officer Russell Gelber was dispatched to 175 Siloam Road. He was not advised by the dispatcher of the prior "open line" calls. When the officer arrived at 175 Siloam Road he did not observe any vehicles outside of the house and it appeared to the officer that the house was unoccupied. The officer knocked, on the front door and the defendant peered through a sheet covering the door. The officer explained to the defendant why he was present and Frankel denied making any 9-1-1 calls. Officer Gelber asked the defendant to step outside and the defendant complied. Gelber briefly patted down Frankel and found nothing, The officer described the defendant's demeanor throughout as unusually nervous and agitated. The officer also stated that Mr. Frankel repeatedly "tripped over his words" throughout their conversation.

Frankel testified that Gelber asked him if he could "look for any bodies within the house." Gelber testified that he told the defendant that he wanted to enter the residence to see if anybody needed assistance. Frankel, who is a computer consultant, refused to allow the officer into his house, repeatedly saying that he had not made the call, "it must have been a computer error." Gelber radioed for backup because he had never faced a situation where he was refused entrance into a home in response to a 9-1-i call. Officer Gelber then asked the dispatcher to call back the

house and upon doing so, the dispatcher reported a busy signal.

Frankel allowed the officer to enter his foyer while Frankel retrieved his two portable phones. From his vantage point in the foyer, the officer could see nothing unusual in the house except for a lawn chair propped up against a sliding door.

Frankel brought back his two portable phones, representing the two phone lines to the house, (732) 625-0590 and (732) 625-0591, to confirm that his phone lines were working. The officer returned outside upon the defendant's return with the two cordless phones. At 7:56 a.m. The defendant called his mother in front of the officer and later demonstrated that the 0590 phone rang when he dialed from the 0591 line.

When Officer Dean Smith arrived, the officers conferred briefly and then advised the defendant that they were entering the house. After finding some marijuana upstairs the defendant was arrested and the officers continued their search. Behind a closed door in the basement Gelber saw a light shining from beneath the bottom of the door and upon opening the door he discovered an elaborate system designed to grow marijuana plants. The search revealed that there was nobody else in the house. Although not testified to at the hearing, the marijuana had to exceed five pounds or ten plants in order to

support a first degree charge under N.J.S.A. 2C:35-4.

Officer Gelber testified that there was no written protocol for responding to a 9-1-1 call within their department. The decision to enter the house was left up to the discretion of the officer. Gelber admitted that he had responded to 9-1-1 calls before that had apparently been made in error and he had always received permission to search. Gelber said he honestly believed someone else was in the house because of the defendant's demeanor, his refusal to allow him to enter the house, and the busy signal.

The defense called Robert Bulthraupt as a witness, who was employed by Bell Atlantic as a team leader for a 9-1-1 control center. He explained how 9-1-1 calls are routed from a caller to a police station, and also explained that there were a number of situations where nonhuman 9-1-1 calls were generated. He cited to examples such as cordless phones with low batteries, answering machines, technician line errors and computer modems. He also testified that if there is a technical problem, there is a rapid beeping that can be construed as a busy signal. The technical problems referred to above during the period of time associated with this case could be as high as 5% of 9-1-1 calls received by dispatchers.

The court also reviewed an expert report of Daniel *A.* Oliver, who was an engineer and a principal in Source Scientific Inc. Daniel Oliver Associates, Inc., a consultative organization specializing in semi-conductor automatic test equipment design, integration, as well as programming. His report was supportive of nonhuman generated 9-1-1 calls. It is interesting to note that the phone records reveal that Frankel's computer, which was turned on, dialed out on the (732) 625-0591 line, at 7:26 a.m. The defendant said he had logged on the computer that morning. This Court is satisfied, after reviewing all of the evidence, that the 9-1-1 call was not deliberately made by the defendant.

II.

Search and seizure law in New Jersey is premised upon Article 1, paragraph 7 of the New Jersey Constitution, which provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be search and the papers and things to be seized.

New Jersey courts are well settled that warrantless searches are presumed to be invalid unless they fall within one of the recognized exceptions to the warrant requirement. State v. Alston, 88 N.J. 211, 230 (1981). The State maintains that the search of the defendant's residence is justified under the "exigent circumstances" exception to the warrant requirement. The New Jersey Supreme Court in State v. Bolte, 115 N.J. *579* (1989) stated that "[t]his Court and the United States Supreme Court have adopted the principle that 'exigent circumstances' in conjunction with probable cause may excuse police from compliance with the warrant requirement." Id. at 585-86. The exigent circumstances exception is "applicable when the search is necessary to prevent disappearance of the suspect or destruction of the object of the search, to search for weapons to protect the safety of an officer, or because of the mobility of a motor vehicle, to prevent its flight." State v. DeLorenzo, 166 N.J. Super. 483, 489 (App. Div. 1979). The exigency must not be impermissibly created by the police to deliberately subvert the warrant requirement, but rather must arise naturally in the course of an appropriate, reasonable police investigation. State v. Hutchins, 116 N.J. 457, 476 (1989).

The "exigent circumstances" exception has recently been discussed in the context of an

automobile search. In State v. Cooke, 163 N.J. 657 (2000), the New Jersey Supreme Court held that under the New Jersey Constitution, both probable cause and exigent circumstances are needed to sustain a warrantless search of a vehicle. The Cooke court opted not to follow the United States Supreme Court which has held that, under the Fourth Amendment of the United States Constitution, a warrantless search of an automobile is valid upon a mere showing of probable cause. This court references the Cooke opinion to illustrate the increased protection afforded citizens under the New Jersey Constitution even in the context of an automobile search, which is generally a lesser protected area than one's home. See, infra.

The utmost protection has been afforded to the warrantless search of a defendant's home. The Bolte court, supra, stated that "[t]he United States Supreme Court and this Court continue to adhere to the notion that warrantless searches or arrests in the home must be subjected to particularly careful scrutiny." Id., at 583. In State v. Bruzzese, 94 N.J. 210, 217 (1983) the court noted that "[h]istorically, the Court has applied a more stringent standard of the Fourth Amendment to searches of a residential dwelling. Indeed, one of this country's most protected rights throughout history has been the sanctity and privacy of a person's home."

The first issue to consider is whether there was probable cause to perform the search of the defendant's residence. "Probable cause has been defined as a well-grounded suspicion that a crime has been or is being commited." Cooke, supra, at 671 (citing Aiston, supra, at 231). "The proper inquiry for determining the constitutionality of a search-and-seizure is whether the conduct of the law enforcement officer who undertook the search was objectively reasonable, without regard to his or her motive or intent." Bruzzese, supra, at 219.

Upon hearing the testimony of the various witnesses and considering the arguments of counsel, this court is not satisfied that the State has met its burden in establishing the existence of probable cause. While it may be true that Officer Gelber subjectively feared that something was amiss within the defendant's residence, the court is not convinced that the facts of this case, when viewed objectively, present a sufficient showing of a well-grounded suspicion that a crime had or would occur. Mere nervousness or agitation itself does not give rise to an articulable suspicion, suggesting criminal activity. See, State v. Lynd, 119 N.J. 35, 47 (1990) (analyzing nervous behavior and furtive gestures in the context of automobile stops). Further, the receipt of an "open line" call does not, in this court's view, give rise to a sufficient degree of suspicion, even when coupled with nervous behavior and the busy signal received by the dispatcher.

There are no New Jersey cases directly on point with the issue raised in this case. However, several out-of-state courts have considered exigent circumstances and probable cause as they relate to emergency calls. In State v. Lynd, 54 Wash. App. 18, 771 P.2d 770 (Wash. Ct. App. 1989) the court held that a warrantless search of a home was justified pursuant to the 'emergency exception." The facts involved in the search included a 9-1-1 call wherein the female caller hung up before explaining why she called, the telephone remained busy after termination of the call. The evidence suggested that a domestic violence dispute had just occurred because upon arrival, the officer noticed a recently inflicted cut on the face of the defendant and the defendant was loading his automobile as if he were preparing to leave. On these facts, the court held that the search of the premises was warranted. The court found that given the information known by the officer at the time, it was reasonable to conduct such a search because "it was reasonable for [the officer] to fear that [the defendant's wife] remained inside, injured." Id. at 23. The court found it reasonable to enter without first securing a warrant, to verify the accuracy of the victim's story, to learn her whereabouts and to take other preliminary measures. Ibid.

In State v. Greene, 162 Ariz. 431, 784 P.2d 257 (1989) the Arizona Supreme Court held that

an officer's entry into the defendant's apartment was justified based on the exigent circumstances that followed a "family fight-domestic violence" call. The court stated that "[t]he call itself creates a sufficient indication that an exigency exists allowing the officer to enter a dwelling if no circumstance indicates that entry is necessary." Id. at 433.

It is clear that the court must balance the individual privacy of one's home against the potential threat to safety that follows an "open line" 9-1-1 call. The balance is certainly a delicate one. However, in this case the court is not satisfied that the "open line" 9-1-1 call, even when coupled with the defendant's allegedly "nervous" behavior and the busy signal is enough to create probable cause to justify a search. The facts of this case are less compelling than the facts of the out-of-state cases cited above, Green and Lynd, both of which found the respective searches to he justified. This case is factually distinguishable from Lynd. Not only was there a person on the line during the beginning of the 9-1-1 call in that case, but there was also additional evidence of a domestic dispute that the officer considered before entering the premises. Here, there were no words expressed on the call and no additional facts, outside of the defendant's apparent "nervousness", to permit this court to conclude that the officer was justified in his search. In Greene, there were also background facts suggesting a history of domestic violence. It is

clear from the language of these opinions that there is a strong interest in allowing officers to respond to and investigate domestic violence calls. In this case, however, there was no such history nor was there any other evidence of impending danger. The court thus concludes that the balance must tip in favor of protecting the sanctity of defendant's home. More compelling facts are needed to justify a wafrantless search following an "open line" 9-1-1 call. Accordingly, the defendant's motion to suppress is hereby GRANTED.